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49. — Alimony may be awarded or denied the wife on her divorce at his discretion.

50. — Custody of the minor children may be decreed to such party as justice and the children's good may require.

51. — Divorce releases both parties, and they shall not be remarried to each other.

52. — Costs are at the discretion of the Consul.

It will be seen from the foregoing regulations that they do not undertake to prescribe the causes for which divorce may be granted, but purport to be little more than rules of procedure.

It thus appears (a) that our treaties with China contain no specific provision on the subject of divorce. (b) That the statutes of the United States which have been extended to China are also silent on this subject. (c) That the Common Law in force in China does not embrace the subject of matrimonial causes, and (d) that the Minister has not issued regulations prescribing grounds on which divorce or judicial separation shall be granted.

In view of the foregoing facts, and the rule universally adopted by the Courts of the United States that Courts have no jurisdiction in matrimonial causes except when specifically conferred by statute, we hold that the United States Court for China is without jurisdiction to hear and determine matrimonial causes.

The demurrer is sustained and plaintiff's petition is dismissed with costs.

Signed: L. R. WILFLEY,
Judge of the United States Court for China.

RE PROBATE OF THE WILL OF JOHN PRATT ROBERTS.

In the United States Court for China.

At Shanghai, May, 1907.

OPINION.

Mrs. Rosalie Adelaide Jackson has filed in this court a document purporting to be the last will and testament of her father, Captain John Pratt Roberts, an American citizen who resided in Shanghai at the date of his death, and she has asked that the same be admitted to probate.

The petition raises the question whether this court has jurisdiction in the matter of the administration of estates of Americans decedent in China. In order to determine this question it will be necessary to inquire into the probate jurisdiction of the American consular courts in China prior to the establishment of this court, because the latter has no jurisdiction that was not possessed by the former.

Section 1 of the Act of June 30, 1906, creating this court, provides that it shall have exclusive jurisdiction in all judicial proceedings whereof jurisdiction may now be exercised by the United States consuls and ministers by law and by virtue of treaties between the United States and China, except in civil cases where the amount involved does not exceed five hundred dollars gold and in criminal cases where the punishment does not exceed a fine of one hundred dollars or sixty days' imprisonment or both. In such cases the consuls retain jurisdiction.

There can be no doubt that China intended by the treaties of extraterritoriality to concede to the United States complete jurisdiction over Americans resident in China, and over their property located in China; and it is equally certain that Congress, by enacting the statute of June 22, 1860, pursuant to the terms of the treaties and for the purpose of carrying the same into full force and effect, meant to extend to China a body of laws adequate to the needs of American citizens resident therein.

The treaty of 1858 provides in Article XXVII as follows:

> All questions in regard to rights whether of property or of person, arising between citizens of the United States in China shall be subject to the jurisdiction and regulated by the authorities of their own Government.

A portion of the Act of Congress of 1860 embodied in Revised Statutes, Section 4085, enacted for the purpose of carrying into full effect the provisions of the treaties, provides in respect to ministers and consuls that

> Such officers are also invested with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person.

This brings us to a consideration of the question whether Congress extended to China a system of laws relating to the administration of estates which the above named officers were to apply.

The answer to this question is found in the provisions of Revised Statutes, Section 4086, which reads as follows:

Section 4086. Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall by decrees and regulations which shall have the force of law, supply such defects and deficiencies."

Since neither the general laws of the United States nor the laws relating in particular to extraterritorial jurisdiction contain specific provisions on the administration of estates, and since the minister has issued no regulations on the subject, it follows that the only source from which jurisdiction might be drawn was the common law.

The question now presents itself, was the law of probate of wills and the administration of estates included in the "common law" which was extended to China by the statute?

The term "common law" has been interpreted by this court to mean:

Those principles of the common law of England and those statutes passed in aid thereof, including the law administered in the equity, admiralty and ecclesiastical tribunals, which were adapted to the situation and circumstances of the American colonies at the date of transfer of sovereignty, as modified, applied and developed generally by the decisions of the State courts and by the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States. United States *v.* Biddle, March 6, 1907.

In order to determine whether the law governing the administration of estates was covered by the common law as thus construed it will be necessary to review the history of the law on the subject with a view to ascertaining, first, whether it was a part of the common law of England and the statutes passed in aid thereof, and, if so, second, whether it has been introduced into the United States as the basis of the American law of probate. On account of the meagerness of the library available to the court at the present time our investigation will be mainly confined to accounts contained in the commentaries of Blackstone and Kent, and Judge Woerner's work on "The American Law of Administration." The law governing the administration of estates in England is com-

monly referred to by text-writers and judges as a part of the ecclesiastical law, which was administered exclusively in the ecclesiastical courts. Though there is warrant in the law for this conclusion by reason of the fact that ecclesiastical courts exercised almost complete jurisdiction over estates of deceased persons for a long period of time in England, yet it will be found upon a close examination of the history of the law that the subject was in fact covered by the common law, that estates were administered in the courts of common law, prior to the establishment of the ecclesiastical courts and that the common-law principles and procedure of the common-law courts appeared in the history of the administration of estates through all the centuries, and have exercised a profound influence on the American law of administration.

With us in England [says Blackstone] this power of bequeathing is coeval with the first rudiments of the law: for we have no traces of memorials of any time when it did not exist. * * * But we are not to imagine that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us that by the common law, as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal. * * * The shares of the wife and children were called their *reasonable* parts. * * * This continued to be the law of the land at the time of *magna charta*. * * * In the reign of King Edward the Third, this right of the wife and children was still held to be the universal or common law. * * * In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ*, and general trustee of the kingdom. This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron, and other courts, or to have their wills there proved, in case they made any disposition. Afterwards, the crown, in favour of the church, invested the prelates with this branch of the prerogative; which was done, saith Perkins, because it was intended by the law that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the crown; * * * And, as he had thus the disposition of intestates' effects, the probate of will of course followed. (Book II, p. 491.)

Continuing in chapter seven of the third book of his commentaries, Blackstone, in discussing the jurisdiction of ecclesiastical courts, says:

Testamentary causes are the only remaining species belonging to the ecclesiastical jurisdiction; which, as they are certainly of a mere temporal nature, may seem at first view a little oddly ranked among matters of a spiritual cognizance. And, indeed, they were originally cognizable in the king's courts of common law, viz., the county courts; and afterwards transferred to the jurisdiction of the church by the favour of the crown as a natural consequence of granting to the bishops the administration of intestates' effects. * * * At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any ancient writer. * * * It appears that the foreign clergy were pretty early ambitious of this branch of power. * * * It fell within the jurisdiction of the spiritual courts by the express words of the charter of King William I, which separated those courts from the temporal. And afterwards, when King Henry I, by his coronation-charter, directed that the goods of an intestate should be divided for the good of his soul, this made all intestacies immediately spiritual causes, as much as a legacy to pious uses had been before. This, therefore, we may probably conjecture, was the æra * * * when the king, by the advice of the prelates, and with the consent of the barons, invested the church with this privilege. (Book III, p. 95–7.)

As far as we are able to ascertain, these deductions of Blackstone are based upon the rulings of the courts in the Hensloe Case (Coke's Reports, Part IX, 36 b) and in Snelling's Case (Coke's Reports, Part V, 32 b).

The Court in Snelling's Case held that:

If the Ordinary took the goods into his possession, he was chargeable by the common law. And the statute of West. cap. 19 was made in affirmance of the common law.

The history of the law, as recited in the Hensloe Case, seems to have met the approval of the annotator of Coke's Reports, who, in commenting upon the same, uses the following language:

It appears to have been a matter of great controversy, to whom the probate of wills and granting of administration originally belonged, and whether these matters were entirely of ecclesiastical cognizance; the better opinion seems to be that the probate of testaments did not originally belong to the ecclesiastical jurisdiction.

Again he says:

Wills may be proved, *i. e.*, recorded in any of the courts of common law at Westminster and so likewise in the courts of equity, as the chancery or exchequer; so also in the chamber of the city of London, and divers other cities and towns; and many lordships and manors have an original right of proving wills. And upon the whole it appears, clearly, that the claim and practice of the spiritual courts in this particular was originally a mere usurpation.

This is also the view taken by Professor Stubbs in his work on the Constitutional History of England. He says:

The whole jurisdiction in questions of marriage was, owing to the sacramental character ascribed to the ordinance of matrimony, throughout Christendom a spiritual jurisdiction. The ecclesiastical jurisdiction in testamentary matters and the administration of the goods of persons dying intestate was peculiar to England and the sister kingdoms, and had its origin, it would appear, in times soon after the Conquest. In Anglo-Saxon times there seems to have been no distinct recognition of the ecclesiastical character of these causes, and even if there had been they would have been tried in the county court. Probate of wills is also in many cases a privilege of manorial courts which have nothing ecclesiastical in their composition, and represent the more ancient moots in which no doubt the wills of the Anglo-Saxons were published. As however the testamentary jurisdiction was regarded by Glanvill as an undisputed right of the church courts, the date of its commencement cannot be put later than the reign of Henry I, and it may possibly be as old as the division of lay and spiritual courts. (Vol. III, p. 344.)

The trust thus vested in the prelates in the course of time, was grossly abused.

The common law did not make him [the ordinary], being a spiritual governor, subject to temporal suits for such things. And this was a great defect in the common law. (Graybrook v. Fox, 1 Plowd. 275, 277.)

The popish clergy, says Blackstone, took to themselves (under the name of the church and the poor) the whole residue of the estate of the deceased, after the *partes rationabiles*, or two-thirds, of the wife and children were divided, without paying even his debts or other charges thereon. This led to the enactment of the Statute of Westminster II., directing the ordinary to pay the intestate's debts so far as his goods would extend. But even after this check to the exorbitant power of the clergy, whereby the ordinary was made liable to creditors, yet the residuum after payment of debts still remained in their hands, to be applied to whatever purpose his conscience should approve. It was the flagrant abuse of this power that again called for legislative interposition; by the Statute of 31 Edward III, c. 11, the estates of deceased persons were directed to be administered by the next of kin of the deceased, if he left no will, and not by the ordinary or any of his immediate dependants. (Woerner, American Law of Administration, vol. 1, p. 316.)

This statute put the representatives of the estates of intestates upon the same footing with respect to suits and accounting as executors and made them officers of the ordinary. By the statute of 21 Henry VIII, c. 5, the discretion of the ordinary in the appointment of administrators to intestate estates was enlarged, so as to authorize the appointment of either the widow, or the next of kin, or both. The Statutes of Distribu-

tion, 22 and 23 Charles II, c. 10, and 29 Charles II, c. 30, made distributable among the widow and next of kin, leaving in the hands of the administrator for his own use the third formerly retained by the church, until finally by the first statute of I James II, c. 17, this third was made distributable, as well as the remainder of the intestate estate. (1 Bradford Surrogate Reports 26; Woerner, American Law of Administration, vol. 1, p. 316; Blackstone, Book II, p. 494, 495).

The powers of the spiritual courts were thus restricted to the judicial cognizance of the class of cases arising out of the probate of wills, the granting of administration and the payment of legacies, and thus remained until, by the statute creating the court of probate, their powers in this respect were wholly abrogated. (20 and 21 Victoria, c. 77).

We have thus traced in brief outline the history of the law of administration of estates in England, wherein it appears that it was a matter cognizable by the common law and in the common law courts until about the period of the Norman Conquest; that thereafter the jurisdiction over the estates of deceased persons was transferred to ecclesiastical courts, proceedings in which, says Blackstone, " were regulated according to the practice of the canon and civil law, or rather according to a mixture of both, corrected and new modelled by their own peculiar usages and interpositions of courts of common law." (Book III, p. 100).

It now becomes necessary to consider how far the principles of the common law thus established and the statutes passed in aid thereof were introduced into the various states of the Union, and became incorporated into the American law of administration.

The English law of devise [says Chancellor Kent] *was imported into this country by our ancestors, and incorporated into our colonial jurisprudence, under such modifications, in some instances, as were deemed expedient.* (4 Commentaries 504.)

In discussing the administration of the estates of intestates the same author makes the following comment:

To avoid repetition and confusion, I shall be obliged to confine myself essentially to the discussion of the leading principles of the English law, and assume them to be the law of the several states, in all those cases in which some material departure from them in essential points cannot be clearly ascertained. * * *

(1) *Of granting administration.* When a person died intestate in the early periods of the English history, his goods went to the king as the general trustee or guardian of the state. This right was afterwards transferred by the crown to the popish clergy; and, we are told, it was so flagrantly abused that Parlia-

ment was obliged to interfere and take the power of administration entirely from the church and confer it upon those who were disposed to a faithful execution of the trust. *This produced the statutes of 31 Edward III, c. 11, and 21 Henry VIII, c. 5, from which we have copied the law of granting administration in this country.* * * *

Before the Revolution, the power of granting letters testamentary and letters of administration resided in New York, in the colonial governor, as judge of the prerogative court, or court of probates of the colony. It was afterwards vested in the court of probates. (2 Commentaries 408–9.)

The learned chancellor then proceeds to give an account of the development of the probate courts, and the law of administration in New York, and indicates that the same were modelled after and based upon the principles of the common law.

Judge Woerner, in his chapter on the subject of the probate powers as they existed at common law and under the English statutes, uses the following language:

The common law of England, as affected by the statutes above named, (and others relating to probate,) which were enacted before the settlement of the American Colonies, is at the basis of the American statutes concerning administration, and the law in the American States in so far as it has not been supplanted by their own statutes. (Woerner, American Law of Administration, vol. 1, p. 316.)

He further states that the origin of our probate system, referable to the English spiritual courts, is still recognizable in the decisions of some states as to their mode of procedure, although the rules of the civil and common law which govern the ecclesiastical courts are necessarily greatly modified in the adaptation to widely different circumstances and to the spirit of the American people. In New Hampshire courts of probate "have a very extensive jurisdiction not conferred by statute, but by general reference to the law of the land, that is to that branch of the common law known and acted upon for ages, probate or ecclesiastical law." Morgan v. Dodge, 44 N. H. 255, 258. In California the superior court is by the constitution invested with jurisdiction over probate matters as a part of its general jurisdiction the same as its common-law and equity powers, and is not, therefore, a statutory tribunal, although controlled in the mode of its action by the code. Burris v. Kennedy, 108 Cal. 331, and Heydenfeldt v. Superior Court, 117 Cal. 348.

While American courts of probate may properly be said to be purely creatures of statute at the present time, yet, as Judge Woerner has pointed out, the law administered by them is unquestionably based upon

the common law as administered in the Acts of Parliament prior to the date of the transfer of sovereignty. We think there can be no question about the proposition that Congress meant to extend the law of the administration of estates to China under the term "common law" as fully as it meant to extend the law of crimes, which must have been its first consideration in enacting the statutes for the purpose of carrying into force and effect the treaties of extraterritoriality with China.

We hold, therefore, that prior to the inauguration of this court, the consular courts of the United States in China had jurisdiction in the matter of the estates of Americans decedent in China, in all cases, and that now this court has jurisdiction in such matters when the value of the estate involved is above five hundred dollars United States currency, the consular courts retaining their jurisdiction over those estates which are valued at less than this amount.

The will is admitted to probate and letters testamentary will issue forthwith.

Signed: L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, *China, May 15, 1907.*